

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

**DESMOND DARRYL HIGGS,
(#1145356),**

Petitioner,

v.

CIVIL ACTION NO. 2:23cv485

**CHADWICK DOTSON, Director,
Virginia Department of Corrections,**

Respondent.

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254 submitted by pro se Petitioner Desmond Darryl Higgs (“Higgs” or “Petitioner”).¹ Higgs challenges his 2005 convictions and sentences from the Henrico County Circuit Court for first-degree murder, using a firearm while committing or attempting to commit murder, and shooting at an occupied vehicle. Specifically, he alleges he was denied his Sixth Amendment right to effective assistance of counsel, denied his constitutional and statutory right to a twelve-person qualified jury, denied his due process rights because the trial court permitted an amendment of the indictment immediately before his trial, and he was unconstitutionally re-tried after his first trial was declared a mistrial.

The matter was referred to a United States Magistrate Judge for Report and Recommendation pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Local Civil Rule 72 of the Rules of the United States District Court for the Eastern District of Virginia. The Magistrate Judge’s Report and Recommendation filed April 12, 2024 recommends Higgs’ claims be dismissed with prejudice for being time-barred, and for his failure to establish grounds for equitable tolling or a

¹ Higgs also filed a Rule 60(b) Motion (ECF No. 14) and Motion for Summary Judgment (ECF No. 17) asking the court to grant his petition for writ of habeas corpus.

plausible claim of actual innocence. The Report and Recommendation also recommended the court deny Higgs' Rule 60(b) Motion and Motion for Summary Judgment and grant Respondent's Motion to Dismiss. The Report and Recommendation advised each party of their right to object and the time limit for doing so. The court has received no objections, and the time for filing objections has now expired.

Accordingly, the court does hereby accept and adopt the findings and recommendations set forth in the Report and Recommendation filed April 12, 2024, and it is therefore ORDERED that Respondent's Motion to Dismiss (ECF No. 10) is GRANTED and that Higgs' petition (ECF No. 1) is DENIED and DISMISSED WITH PREJUDICE. It is FURTHER ORDERED that Higgs' Rule 60(b) Motion (ECF No. 14) and Motion for Summary Judgment (ECF No. 17) are hereby DENIED.

Finding that the basis for dismissal of Petitioner's § 2254 petition is not debatable, and alternatively finding that Petitioner has not made a "substantial showing of the denial of a constitutional right," a certificate of appealability is **DENIED**. 28 U.S.C. § 2253(c); see Rules Gov. § 2254 Cases in U.S. Dist. Cts. 11(a); Miller-El v. Cockrell, 537 U.S. 322, 335–38 (2003); Slack v. McDaniel, 529 U.S. 473, 483–85 (2000).

Petitioner is **ADVISED** that because a certificate of appealability is denied by this Court, he may seek a certificate from the United States Court of Appeals for the Fourth Circuit. Fed. Rule App. Proc. 22(b); Rules Gov. § 2254 Cases in U.S. Dist. Cts. 11(a). **If Petitioner intends to seek a certificate of appealability from the Fourth Circuit, he must do so within thirty (30) days from the date of this Order. Petitioner may seek such a certificate by filing a written notice of**

**appeal with the Clerk of the United States District Court, United States Courthouse, 600
Granby Street, Norfolk, Virginia 23510.**

The Clerk is directed to mail a copy of this Final Order to Petitioner and to provide an electronic copy of the Final Order to counsel of record for Respondent.



/s/

JAMAR K. WALKER,
UNITED STATES DISTRICT JUDGE

Norfolk, Virginia
May 8, 2024